## CHAPTER 2
## PRETRIAL CONFINEMENT AND OTHER PRETRIAL RESTRAINTS ON LIBERTY.

**2-1. INTRODUCTION.** The commander must decide what type of restraint, if any, to impose upon a soldier accused of a crime. The least possible restraint that will guarantee the presence of the accused is the amount that should be imposed. Commanders must remember that any pretrial restraint requires that a soldier be brought to trial within 120 days of its imposition, or within 120 days of notice to the accused of the preferral of charges, whichever is earlier. Before imposing any form of restraint on a soldier, consult your supporting trial counsel. The limits of the restriction must be documented in writing and served on the accused.

**2-2. EFFECT OF PRETRIAL RESTRAINT.** No form of pretrial restraint may be imposed as punishment. Because of the effect it can have on the court-martial process, a commander should consult with supporting trial counsel when considering placing a soldier under any form of pretrial restraint. A soldier must be brought to trial within 120 days after he is given notice of the preferral of charges (usually done the same day the commander prefers charges), or after he is placed under any form of pretrial restraint, whichever is earlier. If the accused is not brought to trial within 120 days of the preferral of charges or pretrial restraint, the charges must be dismissed. The four general forms of pretrial restraint are discussed in the following paragraphs, ranging from the least to the most rigorous.

**2-3. CONDITIONS ON LIBERTY.** Conditions on liberty are imposed by orders directing a person to do, or refrain from doing specified acts. Such conditions may be imposed in conjunction with other forms of restraint, or separately. Conditions on liberty include orders to report periodically to a specified person (e.g., the CQ), orders not to go to a certain place (such as the scene of the alleged offense), and orders not to associate with specified persons (such as the alleged victim or potential witnesses). Conditions on liberty must be sufficiently flexible to permit and not hinder pretrial preparation.

**2-4. RESTRICTION.**

a. Restriction (technically called restriction in lieu of arrest) is a more severe form of restraint. It is the limiting of a soldier's freedom of movement to a particular area or areas. This is usually expressed in terms of "restriction to Fort Sam Houston (FSH)," or "restriction to barracks, mess hall, chapel and place of duty." Any NCO may restrict an enlisted person, but only

a commander may restrict an officer or civilian. A commander may delegate the authority to restrict or place conditions on liberty. Even absent a delegation of authority, however, an NCO may properly restrict a soldier for a brief period in the absence of an officer. For example, if a soldier is involved in an incident downtown at night and is returned to his unit by the military police (MP), an NCO could properly order him to remain in the billets until the following morning.

b. Restriction is usually imposed orally, but it is better to document the terms of the restriction in writing. Restriction should not be imposed unless the commander determines that conditions on liberty alone will not be adequate under the circumstances.

**2-5. ARREST.** Arrest is defined in the military as a moral restraint causing the person arrested to remain within certain specified limits. This is not to be confused with taking a person into custody which is referred to as an apprehension in the military. Before placing an individual in the status of arrest, the commander must make a personal inquiry into the facts surrounding the alleged offense. Unlike restriction, a soldier in the status of arrest does not perform full military duties. He may not exercise command, bear arms, exceed the limits of his arrest, visit his commander unless directed to do so, make any requests except in writing, and he marches at the rear of his unit. A person in arrest, however, may do ordinary cleaning and policing within the specified limits of his arrest.

2-6. PRETRIAL CONFINEMENT.

a. When to impose pretrial confinement. Pretrial confinement is never required by law. It may be imposed only when necessary to ensure the presence of the accused at trial, or to prevent foreseeable serious misconduct, including any efforts at obstructing justice, and only when lesser forms of restraint are inadequate for accomplishing these purposes. The discussion under RCM 305(h)(2)(b) lists the following factors which should be considered prior to imposition of pretrial confinement:

(1) The nature and circumstances of the offenses charged or suspected, including extenuating circumstances;

the weight of evidence against the accused;

(3) the accused's ties to the locale, including family, off-duty employment, financial resources, and length of residence;

the accused's character and mental condition;

(5) the accused's service record, including any record of previous misconduct;

(6) the accused's record of appearance at, or flight from, other pretrial investigations, trials or similar proceedings; and,

(7) the likelihood that the accused can or will commit further serious misconduct if allowed to remain at liberty. For example, if the offense is very serious (e.g., murder), and lengthy confinement is likely, pretrial confinement is probably appropriate.

b. Basis for confinement. A commander may not put a soldier in pretrial confinement, unless the commander believes upon probable cause, that is, upon reasonable grounds, that:

(1) An offense triable by a court-martial has been committed;

(2) the prisoner committed it; and

(3) confinement is necessary because the prisoner will not appear at trial or pretrial proceedings, or the prisoner will engage in serious criminal misconduct; and

(4) lesser forms of restraint are inadequate.

c. Consideration of lesser forms of restraint. Less serious forms of restraint must always be considered before pretrial confinement may be approved. The commander should consider whether the soldier could safely remain in the unit at liberty, or under some form of restriction, arrest, or conditions on liberty. There are a number of instances where pretrial confinement is not appropriate, and commanders should be aware of them. For example, pretrial confinement is not ordinarily proper when disposition of the charge by Special Court-Martial (SPCM) is contemplated. Also, in the case of an individual who is pending proceedings for an administrative discharge, where no charges are pending, pretrial confinement is not authorized. Pretrial confinement is not authorized to prevent a soldier from injuring himself.

d. Procedures. When a committing officer (normally a soldier's unit commander) is determining whether to place a soldier in pretrial confinement, he will consult his servicing trial counsel; Chief, Criminal Law Division; or the on-call SJA duty officer.

(1) It is the committing officer's responsibility at the time of confinement to advise the accused of the nature of the offenses for which he is being held, the right to remain silent, the right to request military counsel at no expense to him, and to retain civilian counsel at no expense to the United States, and the procedures by which pretrial confinement will be reviewed. This advice is required by RCM 305(e). The commander will avoid any discussion with the accused regarding the offenses pending disposition.

(2) A copy of the DD Form 458, Charge Sheet, written statements concerning the offenses, and any other documentation supporting the need for pretrial confinement, for use by the military magistrate.

(3) Within 48 hours of the imposition of pretrial confinement, the military magistrate will review the adequacy of probable cause to believe the soldier has committed an offense and of the necessity for continued pretrial confinement. His review will include the commander's memorandum on DA Form 5112-R, Checklist for Pretrial Confinement, and any additional written matters, including any submitted by the accused.

(4) The soldier and his defense counsel will be allowed to appear before the magistrate and make a statement, if practicable. A representative of the command may appear before the magistrate to make a statement, but this is not required. The magistrate decides whether the soldier will remain in confinement or be released. After charges have been referred to trial by a convening authority, the military judge can review the propriety of pretrial confinement if the defense counsel makes a motion to that effect. The military judge can order the release of the soldier and order more than day-for-day credit for any pretrial confinement served as a result of an abuse of discretion or the failure to comply with the procedural requirements for confinement. A commander should terminate pretrial confinement if he later determines that it is no longer necessary.

**2-7. RESERVE CONSIDERATIONS.** There is no UCMJ provision for pretrial confinement or other pretrial restraints on liberty for RC soldiers not serving on active duty. Reserve component soldiers on active duty, or RC soldiers involuntarily ordered to active duty, may be placed in pretrial confinement under the same circumstances as active component (AC) soldiers. Procedures for ordering a RC soldier to involuntary active duty are described in chapter 8 of this pamphlet.

# CHAPTER 3
# THE COURT-MARTIAL SYSTEM.

**3-1. INTRODUCTION.** The goal of the court-martial system is to achieve justice as well as maintain good order and discipline in the service. As in all American criminal courts, court-martials are adversary proceedings. That is, lawyers representing the government and the accused vigorously present the facts, law, and arguments most favorable to their side following the rules of procedure and evidence. Based upon these presentations, the military judge decides questions of law. The members of the court-martial, as a jury, or the military judge in a trial by military judge alone apply that law and decide questions of innocence or guilt. Court-martial convictions above the Summary Court-Martial (SCM) level are considered federal convictions.

## PREFERRAL OF CHARGES.

a. Charges for all forms of trial by court-martial are preferred by completing sections I, II, and III of the charge sheet, DD Form 458. Charges should be drafted by your supporting trial counsel. If an enlisted unit legal specialist or civilian paralegal draft the charges, then the charges must be checked by the supporting trial counsel before preferral to ensure that they properly allege an offense, and that there is competent evidence to support the charges. A RC commander should consult his supporting AC SJA, coordinating through his RC SJA, or trial counsel before preferring court-martial charges. A RC commander must be subject to the UCMJ at the time he prefers charges against a soldier. Also, the officer who swears him to the charges must be subject to the UCMJ at the time the oath is administered. Reserve component commanders do not have to be subject to the UCMJ at the time they endorse charges forwarded to the next level of command.

b. Prior to preferral of charges, the commander must conduct, or cause to be conducted, a preliminary inquiry into the suspected offenses, even if it consists only of reading statements or reports concerning the offense. He then includes all available evidence, i.e., police reports, statements, photographs, etc., as allied papers to the DD Form 458 at the time of preferral. A commander may dispose of offenses within the limits of that officer's authority, or forward a matter concerning an offense, or charges to a superior or subordinate authority for disposition.

## SUMMARY COURT-MARTIAL.

a. Function. A SCM, which may only try enlisted soldiers, is designed to deal promptly with minor offenses under a simple

procedure. It is composed of one officer in the grade of captain (CPT) or above, and is normally convened by a battalion commander. It may also be convened by anyone having the authority to convene a SPCM, or a GCM. Either an active duty or RC SCM Convening Authority (SCMCA) may refer charges against RC soldiers to trial by SCM.

b. Referral of charges. Charges are referred to trial by SCM by the convening authority. This is accomplished by completing part V of DD Form 458. A SCM may be convened at the time of referral. See paragraph 12-4, AR 27-10, for the method of convening a Summary Court and detailing a Summary Court Officer by annotating part V of the DD Form 458.

c. Consent to trial. An accused may not be tried by SCM if he objects to such a trial. If the accused objects to trial by SCM, the Summary Court Officer will note the objection in block 6 of the DD Form 2329, Record of Trial by Summary Court-Martial, and return the DD Form 458 and DD Form 2329 to the convening authority for disposition. If the accused consents to trial by SCM, the Summary Court Officer will proceed with the trial.

d. Trial procedure. Trial by SCM is carried out in accordance with (IAW )the procedure outlined in Appendix 9 of the MCM, Guide for Summary Court-Martial; DA Pam 27-7, Guide to Summary Court-Martial Trial Procedure, and paragraph 5-21 of AR 27-10. The same rules of evidence apply at SCM as at other courts-martial. Reserve component soldiers may be tried by SCM while serving on active duty for training (ADT), annual training (AT) or inactive duty for training (IDT). If the trial takes place during IDT, it may not extend past the normal training period. If the SCM officer is a member of the RC, he must be subject to the UCMJ at the time he conducts the trial, as must be the accused.

e. No entitlement to military counsel. An accused is not entitled to representation by military counsel in a trial by SCM, but may consult with military counsel before trial. He may have a civilian attorney represent him at trial at no expense to the government, if the civilian counsel's appearance will not unreasonably delay the proceedings. A DA Form 5111-R, Summary Court Martial Rights Notification/Waiver Statement, will be completed and attached to the charge sheet.

f. Punishments. A SCM may only confine soldiers who are serving in the grade of Specialist (E-4) or below, for a maximum period of 30 days. For RC soldiers, punishments involving restrictions on liberty can only be served during regularly

scheduled drill periods. All punishments that remain unserved at the time soldiers are released from training are carried over to subsequent duty periods.

g. Convening authority's action and Judge Advocate review. At the conclusion of a trial by SCM, the Summary Court Officer must serve a copy of the authenticated DD Form 2329 on the accused and obtain a receipt, which will be attached to the original record of trial. The original and one copy of the DD Form 2329 are forwarded to the convening authority. Within seven days after trial, the accused may submit any written matters to the convening authority which may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilty, or to approve the sentence. The convening authority may extend this period for up to ten more days, for good cause. The convening authority may not take action within the seven-day period, unless the accused submits matters before then, or waives his right to submit matters in writing. After the convening authority takes action, the case is sent to the Criminal Law Division of the SJA office for review by a Judge Advocate under RCM 1112, MCM, 1995.

## 3-4. SPECIAL COURT-MARTIAL (SPCM).

a. Function. The SPCM is the intermediate court in the military system. Its punishment powers for enlisted soldiers includes reduction to Private (E-1), forfeiture of two-thirds pay for six months, and confinement for six months. A SPCM may not confine an officer. Also, a SPCM may impose a fine in lieu of a forfeiture. The membership of a SPCM may take any one of three different forms. It may consist of (a) at least three members; (b) at least three members and a military judge (normally a military judge will be detailed to all SPCM); or, (c) solely of a military judge if the accused so elects. If the accused requests orally or in writing, that the court have enlisted membership, then at least one-third of the membership of the court must be enlisted from Battery- or Company-sized units other than his own. The court members must outrank the accused. The accused has a right to be represented at the trial by a military lawyer or a civilian lawyer at his own expense, or both.

b. Referral of charges. Charges are referred to trial by SPCM by the SPCM Convening Authority (SPCMCA). This is accomplished by completing part V of the DD Form 458. Only an active duty GCM Convening Authority (GCMCA) may refer charges against RC soldiers to a SPCM. Prior to arraignment, the RC soldier must be on active duty.

c. Trial procedure. Ordinarily, the SPCM will be presided over by a military judge. In the event a judge is unavailable,

however, the senior officer present presides as president. The procedure for such a courts-martial is set out in appendix 8, MCM, Guide for General and Special Courts-Martial.

## 3-5. BAD-CONDUCT DISCHARGE SPECIAL COURT-MARTIAL

a. Distinctive features. The BCD SPCM is basically the same as the SPCM outlined above, except that this court-martial has the additional power to adjudge a BCD as punishment. There are certain requirements which must be met before such a punishment may be imposed. In order for a SPCM to have the authority to impose a BCD, a qualified defense counsel and a military judge must be detailed, and a verbatim record be kept.

b. Referral of charges. Charges are referred to trial by BCD SPCM authorized to adjudge a BCD by the GCMCA. This is accomplished by completing part V of DD Form 458, and will be prepared by the Criminal Law Division, SJA.

c. Bad conduct discharge special as an option. The BCD Special Court option provides a forum for those cases where a convening authority deems a punitive discharge warranted, but does not feel that the charges are serious enough to deserve confinement in excess of six months. This will benefit an accused who is tried by Special Court, since he is not faced with the risk of a long period of confinement as he would be in a GCM.

## 3-6. GENERAL COURT-MARTIAL.

a. Function. The GCM is the highest trial court in the military and must be convened by a GCMCA. This court-martial tries military personnel for the most serious crimes. The punishment powers of the court are limited by each offense listed in part IV of the MCM.

b. Article 32 investigation. No charge may be referred to a GCM for trial until a thorough and impartial investigation of the charges has been made IAW Article 32, UCMJ. If a GCM is considered appropriate, the SPCMCA will immediately detail a mature commissioned officer as investigating officer. The officer appointed to conduct this investigation should be a field-grade officer, or an officer with legal training and experience. The purpose of the investigation is to inquire into the truth of the matters set forth in the DD Form 458, the correctness of the form of the charges, and to secure information upon which to determine what disposition should be made of the case. The DA Pam 27-17, Procedural Guide for Article 32(b) Investigating Officer, provides

a guide for use by the investigating officer. Upon notification of detail, the investigating officer will report to the Chief, Administrative Law Division, for an initial briefing on duties and procedures. An Article 32 investigation is the principal duty of the investigating officer until completed. An Article 32 investigation being conducted concerning a RC soldier requires that the investigating officer, the accused, and the legal specialist recording the case all be subject to the UCMJ at the time the Article 32 is actually conducted.

c. Referral of charges. Charges are referred to trial by GCM by the GCMCA. This is accomplished by completing part V of the DD Form 458, and will be done by the Criminal Law Division, SJA. Only an active duty GCMCA may refer charges against a RC soldier to a GCM. The soldier may be tried only while serving on active duty.

d. Composition. The GCM may take either of two forms. It may consist of a military judge and not less than five members, or a military judge alone, if the accused requests that the court be composed only of a military judge. In any case there must be a military judge detailed to the court. The accused may elect trial by judge alone in all cases except those which are referred to trial as capital cases, that is, cases in which the death penalty could be imposed. If requested by the accused, he is entitled to at least one-third enlisted membership from Battery- or Company-sized units other than his own.

e. Detail of counsel. Trial and defense counsel are also detailed for each GCM. Both the detailed trial counsel and defense counsel at a GCM must be lawyers and certified by The Judge Advocate General (TJAG).

**3-7. RESERVE CONSIDERATIONS.** A SCM is the only type of court-martial that may be referred to trial by an RC convening authority. This court-martial is tried during normal drill periods, and all confinement or restriction is served during normal drill periods. Prior to initiation of any court-martial proceeding, RC commanders must consult with the supporting AC SJA or trial counsel.

CHAPTER 4
THE COMMANDER'S DUTIES BEFORE TRIAL

**4-1. INTRODUCTION.** Upon receiving a DD Form 458 with its allied papers, a commander with authority to convene a court-martial must examine the file and decide which of the options available he will exercise. If he should decide to refer the case to trial, he incurs certain additional duties. While a commander must have a good understanding of the military justice system and his role in that system, he must never hesitate to consult with the SJA or trial counsel if any question arises concerning the proper disposition of a case.

**4-2. ENSURE THERE IS A CASE.**

a. Ensure charges allege offenses. One of the most irritating experiences for a commander is to charge an individual and send him to trial only to have the military judge dismiss because of a failure of the specification to state an offense.

(1) Part IV (Punitive Articles) of the MCM contains a description of the various crimes which constitute offenses under the UCMJ. Part IV also includes a discussion of the proof which is required to sustain a conviction for each offense. The elements of the offense are those facts which must be proved beyond a reasonable doubt in order to sustain a conviction. The adequacy of the specification should always be checked by the trial counsel before the case is referred to trial.

(2) In the event an offense is not properly alleged, the convening authority should return the DD Form 458 to the accuser for correction. In the event such action is necessary, it should be expedited to ensure that the accused is not denied his right to a speedy trial.

(3) If an offense is not covered in Part IV, it is possible that a specification alleging a violation of Article 134, UCMJ, can be drafted by the trial counsel.

b. Ensure the evidence supports the allegations. It is also essential to ensure that there is sufficient competent evidence to support the allegations in the charges. In processing charges, it may not be necessary for a commander to await the results of a Criminal Investigation Command (CID) laboratory analysis before he forwards the DD Form 458. For example, if a soldier admitted that he had marijuana in his possession, and the company commander desires to charge him with a violation of Article 112a, UCMJ, he may prefer charges and send the charge sheet forward even though the lab analysis has not been completed.

c. Consider the individual soldier. In addition, the commander and the convening authority must inquire into the background of the individual before he can make an intelligent decision as to how to dispose of the charges. There may be factors in the soldier's background or adjustment to his unit which, in part, caused him to commit the offense with which he is charged. Such factors should be considered by the convening authority.

**4-3. DISPOSITION OF CHARGES.**

a. Dismissal. A commander may dismiss charges that have been preferred. A decision to dismiss a charge does not bar other disposition of the offense, such as administrative action or Article 15 punishment by the same commander, or preferral or repreferral of a charge by the same or a superior commander. Charges are ordinarily dismissed by lining-out and initialing the deleted specification, or by signing a memorandum directing dismissal "without prejudice." When all charges and specifications are dismissed, the accused and the accuser should ordinarily be informed. A charge should be dismissed when it fails to state an offense, when it is unsupported by available evidence, or when there are other sound reasons why trial by court-martial is not appropriate on the charge. If an accused has already refused Article 15 punishment, but later requests that the Article 15 be reoffered, charges are usually dismissed after Article 15 punishment is imposed.

b. Returning charges to subordinate authority. Instead of dismissing charges or taking other action, a commander may return the charges to a subordinate commander for whatever action the subordinate deems appropriate. This might occur if the commander did not think the offense was as serious as did the subordinate commander. When returning charges to a subordinate commander, the superior commander may not normally direct that the subordinate dispose of the charges in any particular way. Normally, the superior commander should only indicate that the subordinate commander dispose of the charges by a means within the subordinate's authority. Otherwise, an issue of unlawful command influence may result.

c. Referring charges to trial. Where an accused's prior record, the seriousness of the offense, and the needs for justice and discipline indicate that a trial by court-martial is warranted, the convening authority may dispose of the charge by referring it to a court-martial for trial. The referral of a case for trial is accomplished by completing part V of the DD Form 458.

(1 In deciding what options are appropriate for a

particular fact situation, a commander must consider several aspects.

(a) The charges should be referred to the lowest court which can adjudge an appropriate punishment.

(b) Consistent with the needs of discipline and justice, there should be relative uniformity in the treatment of military justice matters.

(c) A commander should also analyze the type of offense with which he is dealing and determine whether the offense is one where there is a victim involved, such as larceny. He should look to see what injury, if any, was inflicted upon the victim.

(d) An inquiry should be made to determine what evidence, if any, there is of premeditation and reflection.

(e) A commander should take into account the character and age of the accused as well as his previous military and civilian history.

(f) Additionally, an offender's mental state, any mental or emotional problems, any signs the individual has shown toward rehabilitation, such as good duty performance since the offense was committed, should be considered.

(2) In addition to studying the nature of the offense and the background of the offender, a commander should consider a number of command factors in disposing of a case. The recommendations of subordinates should be given their due weight since they are closest to the situation and are likely knowledgeable of the facts. Such reliance should be tempered by caution, however, in that the subordinate is also plagued with having the troublemaker in his unit. A court-martial may appear to be an easy way to get rid of an unwanted soldier. Alternatively, the immediate commander may feel some pressure from the accused's friends within the unit not to take adverse action against the accused.

(3) The previous disposition of similar offenses within the same command should be considered. The administration of justice should be even-handed. If one soldier is given an Article 15 for an offense and another soldier is given a SPCM for the same offense under the same circumstances, the soldiers may perceive the system as unfair. Every offense and every offender is different. Military law requires individualized disposition and punishment of offenses.

d. Forwarding charges to superior authority. The commander may feel that his power is inadequate to handle the case. If this is the situation, he must forward the file to a superior authority whose judicial or nonjudicial powers are greater than his. For example, if a SCM convening authority believes that a punitive discharge is warranted, he will have to forward the file through channels to the GCMCA, the only authority who can convene a BCD SPCM or a GCM. Fort Sam Houston Transmittal Memo is used for this purpose. Reserve component commanders do not have to be subject to the UCMJ to forward charges to the next level of command. When charges are forwarded to a commander who is not a superior of the forwarding AC or RC commander, no recommendation on disposition may be made.

**4-4. PSYCHIATRIC EVALUATIONS.** Commanders must comply with Department of Defense (DOD) policy when they refer a soldier for a mental health evaluation. It is DOD policy that:

a. A commanding officer shall consult with a mental health professional before referring a soldier for a mental health evaluation to be conducted on an outpatient or inpatient basis.

b. The commander will ensure that the service member receives written notice of the referral. Written notice shall include, at a minimum:

(1 The date and time the mental health evaluation is scheduled.

(2) A brief factual description of the behaviors and/or verbal expressions that caused the commander to determine a mental health evaluation is necessary.

(3) The name or names of the mental health professionals with whom the commanding officer has consulted before making the referral. If such consultation is not possible, the notice shall include the reasons why.

(4) The positions and telephone numbers of the authorities, including attorneys and Inspector General's (IGs), who can assist a service member who wishes to question the referral.

(5) The service member must be provided with a copy of the following rights which apply when a service member is referred for a mental health evaluation, other than an emergency:

(a) Upon the request of the soldier, an attorney who is a member of the Armed Forces or employed by DOD and who is

designated to provide advice shall advise the member of the ways in which the soldier may seek redress.

(b) If a soldier submits to an IG an allegation that the soldier was referred for a mental health evaluation in violation of DOD Directive 6490.1, Mental Health Evaluations of Members of the Armed Forces, or implementing directives, the IG DOD, shall conduct or oversee an investigation of the allegation.

(c) The soldier shall have the right to also be evaluated by a mental health professional of the soldier's own choosing if reasonably available. Any such evaluation, including an evaluation by a mental health professional who is not an employee of the DOD, shall be conducted within a reasonable period of time after the soldier is referred for an evaluation, and shall be at the soldier's own expense.

(d) No person may restrict the soldier in communicating with an IG, attorney, member of Congress, or others about the soldier's referral for a mental health evaluation. This provision does not apply to a communication that is unlawful.

(e) In situations other than emergencies, the soldier shall have at least two business days before a scheduled mental health evaluation to meet with an attorney, IG, chaplain, or other appropriate party. If a commanding officer believes the condition of the member requires that a mental health evaluation occur sooner, the commanding officer shall state the reasons in writing as part of the request for consultation.

(f) If the soldier is in circumstances related to the soldier's military duties that make compliance with any of the procedures in paragraphs 1-5(e) above impractical, the commanding officer seeking the referral shall prepare a memorandum stating the reasons for the inability to comply.

(6) The service member's signature attesting to having received the notice described above. If the service member refuses to sign the attestation, the commander shall so indicate on the notice.

c. This policy does not apply to:

(1 Patient self-referrals.

(2) Referrals that are a function of routine diagnostic procedures and made by health care providers not assigned to the service member's command.

(3) Referrals to family advocacy programs.

(4) Referrals to drug and alcohol rehabilitation programs.

(5) Referrals to mental health professionals for routine evaluations as required by other Department of the Army (DA) regulations (e.g., AR 635-200, Enlisted Personnel, and AR 135-178, Separation of Enlisted Personnel).

(6) Referrals related to responsibility and competence inquiries conducted pursuant to Rule for Courts-Martial Rule 706

(7) Referral for mental health evaluations required pursuant to AR 380-67, The Department of the Army Personnel Security Program, for certain duties (e.g., security clearance evaluations, personnel reliability program, etc.).

d. Reference: MSG dated 3 MAR 96 from HQDA, subject: Mental Health Evaluations (Clarification), in effect until publication of revision or change to AR 600-20 or 1 MAR 98, whichever occurs first.

## 4-5. AN ACCUSED'S RIGHT TO A SPEEDY TRIAL.

a. The 120-day rule. An accused must be tried within 120-days after (1) being placed under pretrial restraint such as conditions on liberty, restriction, arrest, or pretrial confinement, (2) after he has been notified that charges have been preferred, or (3) if the accused is in a RC, when involuntarily ordered to active duty if charges have not yet been preferred (see chapter 2). The 120-day period is "accountable days" that the government is responsible for, and properly approved defense-requested delays are deducted from the time period. However, for a RC soldier, up to 60 days may be excluded beginning on the date of the initial request for involuntary active duty, and ending on the day the member reports for active duty. Denial of the accused's right to a speedy trial may result in dismissal of the charges.

b. Avoiding unnecessary delay. The best way to avoid unnecessary delay is to have the job done correctly the first time. Files should be hand-carried to higher headquarters. Incidents should be investigated immediately while the facts are still fresh. Forwarding of charges should not be delayed while awaiting an extract of previous convictions. If there is any doubt as to how to proceed, the trial counsel should be consulted. Without evidence there is no case; vital witnesses should not be allowed to transfer. Delay in calling witnesses from distant locations due to an oversight on the part of the government may be charged as unreasonable delay. Accurate notes should be made of

the reasons for any delay. Article 33, UCMJ, requires that when a soldier is being held in pretrial confinement for trial by GCM, charges, allied papers, and the report of investigation should be forwarded to the GCMCA within eight days. If the case cannot be forwarded within eight days, the commander in control of the case file must forward a written explanation for the delay to the GCMCA. It is imperative that this statutory requirement be met. It is an unreasonable, unexplained delay which causes dismissal for lack of a speedy trial.

**4-6. DISCHARGE IN LIEU OF TRIAL BY COURT-MARTIAL, CHAPTER 10, AR 635-200.**

a. Basis for request. Chapter 10, AR 635-200, Enlisted Personnel, provides that a soldier who is charged with an offense or offenses punishable by a BCD or dishonorable discharge may submit a request for discharge in lieu of trial by court-martial. The GCMCA is the approval and disapproval authority for these requests. The discharge request must be reviewed by the SJA office prior to decision by the separation authority. Selective use of this discharge authority is encouraged when the commander determines that the offense is sufficiently serious to warrant separation and the soldier has no rehabilitation potential.

b. Processing the request. The request is initiated by the accused. This request must be forwarded through command channels, with intermediate commanders recommending approval or disapproval. If approval is recommended, the type of discharge to be issued also will be recommended. A discharge under Other Than Honorable Conditions normally is issued, but either an Honorable or General Discharge may be approved in meritorious cases. A number of items must ordinarily accompany the form, which are usually provided by the accused's defense counsel. For example, the request should include a copy of the DD Form 458, all reports of investigation, a statement as to the accused's mental responsibility (optional), and the recommendations of subordinate commanders. A medical report is required only if the accused requests a medical examination. If he does, a mental status evaluation must also be completed and included in the packet.

**4-7. RESERVE CONSIDERATIONS.**

a. Involuntary active duty

(1) Reserve component soldiers who are not serving on active duty, and who are made the subject of proceedings under Articles 15 and 30, UCMJ, for offenses allegedly committed while serving on active duty, ADT, AT or IDT, may be ordered to active duty involuntarily by an AC GCMCA for the purpose of:

(a) Investigation pursuant to Article 32, UCMJ;

trial by court-martial; and

Article 15, UCMJ, proceedings.

(2) Involuntary active duty is authorized for any of the purposes set out above, but is not authorized for the sole purpose of placing soldiers in pretrial confinement. Pretrial confinement for a RC soldier must be approved by the Secretary of the Army or his representative. The Secretary of the Army, or the Secretary's designated representative, must also approve any involuntary active duty order before a RC soldier may be confined or deprived of liberty (to include pretrial confinement or restriction) during an other than normal IDT/active duty.

(3) Requests for involuntary active duty will be forwarded through command channels to the Regional Support Command (RSC) commander. Requests should include a copy of the DD Form 458 and a summary of the evidence supporting the charges. Prior to preferral of charges, commanders will consult with the supporting RC and active duty component SJA personnel. Regional Support Command commanders will forward requests for involuntary active duty to the Commander, United States Army Garrison (USAG) Fort Sam Houston (FSH), ATTN: MCGA-JA-CL. Reserve component soldiers must be on active duty prior to arraignment at a GCM or SPCM or prior to being placed in pretrial confinement.

b. Extending RC soldiers on active duty. The requirements for AC GCMCA activation and/or Secretarial approval do not apply to RC soldiers on active duty. Reserve component soldiers serving on active duty, ADT or AT may be extended on active duty involuntarily, so long as action with a view toward prosecution is taken before the expiration of the active duty, ADT or AT period. A RC soldier who is suspected of or accused of an additional offense after being ordered to active duty may be retained on active duty. See paragraph 1-24, AR 635-200, and AR 135-200, Active Duty For Training, Annual Training and Active Duty for Special Work of Individual Soldiers, chapter 8 (Disposition of Individual Soldiers on Active Duty (AT, IADT, ADT, and ADSW) and Full-Time Training Duty of Individual Members.

c. Reserve component military justice actions. Such actions will follow the RC chain of command. The RSC SJAs will review all cases requesting disposition by an AC GCMCA. The RSC SJA will informally coordinate these cases with the AC SJA prior to a formal request for disposition. Forwarding endorsements will be personally signed by the RSC commander.